Supreme Court of Louisiana.

No. 5768.

STATE OF LOUISIANA, Appellee,

vs.

CHARLES CLINTON, ET ALS.: WILLIAMS & GUION, Intervenors, Appellants.

Reply to authorities of Appellants on question of BONA FIDES.

A. P. FIELD, Attorney General.
J. Q. A. FELLOWS, and
J. B. COTTON, of Counsel.

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Reply to authorities of Appellants on question of BONA FIDES.

Since our reply to the brief of appellants, their counsel have, on two several occasions, furnished two additional authorities on each occasion, and an argument in a case in the United States Circuit Court, in which, on pages 19 and 20, the two last cited authorities are commented on. These are cited "on questions of *bona fide* holder of bonds."

In Bissell et al. vs. City of Jefferson 24 How. 287; the authority in the city depended upon a vote of the people, of which the city council were by the law authorizing the issue, the canvassers. The votes were canvassed *twice*, by two councils, and "duly certified copies of the proceedings of the common council were exhibited to the plaintiffs at the time they received the bonds, and upon the bonds themselves, it was recited that three-fourths of the legal voters (the number required by the law) had petitioned for the subscription."

The case at bar presents no such features of caution on the part of Williams & Gnion, the intervenors; on the contrary, they did not even read the law itself, printed on the back of their bonds; they testify they never read the law. Had they taken the simple precaution to have read the law on the back of their bonds and compared it with the date of issue, they would have perceived that the conditions of the law could not possibly have been complied with, and that the bonds were a fraudulent issue. Good faith in such a case can not be imputed to them. The cautions stated in the case above cited, prove the contrary of good faith.

In Rogers vs. Burlington, 3 Wall. 654, it is held that "power to borrow money for *any* public purpose, gives authority to a municipal corporation to borrow money to aid a railroad company, making its road as a way for public travel and transportation; and as a means of borrowing money to accomplish this object, such municipal corporation may issue its bonds, * * * power to issue the bonds being shown, the municipal corporation, as against *bona fide* holders of them for value, is estopped to deny that the power was properly executed."

In the case cited above, the municipal authorities were allowed *to issue bonds in any case*, and on this clause, the estoppel was maintained. In the case at bar, there was no such clause. The Governor was authorized to issue the bonds only on the happening of a certain event, and on the condition that the event happened within a certain time. There is nothing in

the decision which warrants the rule to be extended to the features of the case at bar.

The case of the city of Lexington vs. Butler, 14 Wall. 283, is identical with that in 3 Wall. 654, just commented on.

In Grand Chute vs. Winegar, 15 Wall. 355, in the law authorizing the subscription of the stock by the *municipal* authorities and the giving of bonds for the stock subscribed, the authorities of the town of Grand Chute were made the judges of the election, which was held to authorize the issue of the bonds. They determined there was the requisite majority. This case is not dissimilar from the other three already commented on, and furnishes no authority for the estoppel claimed in this case; in fact, these additional authorities are no support to those already cited in the brief of appellants.

The authority to issue, was alone contested in the cases cited, and was shown to have existed absolutely, and that the holders of the bonds knew of the authority and took cognizance of the existence of the authority, *and of the happening of the events on which the authority rested.* In the case at bar, all the precautions were omitted by the appellants. They did not even inquire if there ever had been any contingent authority in the Governor to issue the bonds in any event.

The State, by acts of 1869 and 1870, granted to the New Orleans, Mobile and Texas Railroad Company the right to build a railroad from the west bank of the Mississippi river opposite New Orleans to the Sabine river, in the direction of Houston, Texas, and

a branch road from Vermilionville to Shreveport. *In order to facilitate the speedy construction of this road, main line and branch*, the Legislature, by these acts, authorized the Governor to guarantee the second mortgage bonds of the railroad company to the extent of $12,500 per mile, as sections of forty miles should be completed, and the rails laid thereon. Had there been no other conditions than the limit of time within which the road,(main line and branch,) was to have been completed, in entirety, to the guarantee of the bonds by the Governor before the time of final completion, the authorities cited by appellants as to *bona fide* third holders would apply, and the State could not probably have gone back and shown that the sections of railroad had not been completed according to contract.

But the act printed on the back of the bonds, and which act, we repeat, the appellants testify they never read, shows that there were limits as to time, at the expiration of which the power granted to the Governor to guarantee the bonds, ended; the right to call for the guarantee, in the words of the statute, "ceased and determined." There is no such condition as to the issuance of the bonds in any of the cases cited.

A continuous section of forty (40) miles of the railroad was to have been completed before the eighteenth of January, 1871, under penalty of the forfeiture of the grant. The proof is that less than fifteen (15) miles of the first section had been completed at that date. The power of the Governor, then, had, from that time, ended. He could no longer

bind the State by guaranteeing the bonds of the company. This, all holders of these bonds, must have known, for they are bound to take notice of the laws of the State. Taking such notice, they would at once have perceived that the power of the Governor to bind the State by his indorsement of guarantee had "ceased and determined;" that the State was not bound by any guarantee he might make.

This condition, exacted from the company in order to insure a more speedy construction of the railroad from New Orleans to Houston and Shreveport, attached both to the main line and the Shreveport branch. All the conditions in the act of 1869, governing the main line, was incorporated in the act of 1870, as governing the guarantee of the bonds on the Shreveport branch, except the longer time allowed (to May, 1875) *to complete* the Shreveport branch and to lay the rails thereon.

No *bona fides* can then be invoked in favor of third holders. The guarantee never had a legal existence. The State repudiates no contract it ever made, or authorized any one to make in its name.

There, then, being no subsisting contract in April, 1871, on the part of the State to guarantee any of the bonds of the railroad company, the act of 1871, under which the bonds in controversy purport to have been issued, and the *issue* of bonds under that act, was the creation of a new debt, in violation of the constitutional amendment limiting the State debt. The act itself was unconstitutional and the bonds null and void *ab initio*, having been issued without authority.

Supreme Court of Louisiana.

THE CITIZENS' BANK OF NEW ORLEANS,

vs.

THE FUNDING BOARD.

Appeal from the Superior District Court, parish of Orleans.

A. P. FIELD,
Attorney General.
J. Q. A. FELLOWS,
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Of Counsel.

Supreme Court of Louisiana.

THE CITIZENS' BANK OF NEW ORLEANS,

vs.

THE FUNDING BOARD.

Appeal from the Superior District Court, parish of Orleans.

The plaintiff as holder and owner of sixty bonds of one thousand dollars each, known as the second mortgage bonds of the New Orleans, Mobile and Chattanooga Railroad Company, authorized to be issued under act No. 26, of 1869, by the Legislature of Louisiana, having applied to the board for funding the State debt under act No. 3, of 1874, and the funding of the bonds having been refused, brought this suit by way of mandamus against the said board to compel the funding of the bonds, and prayed that the mandamus be made peremtory. The plaintiff set up that it became the owner of the bonds by purchase in market overt in New York in 1872, and adduced proof that it had paid thirty-five thousand dollars for the sixty bonds; that as shown by the bonds, the Governor of the State under the provisions of the act, had signed a certificate on the back of the bonds and as permitted by said act had given the guarantee of the State that it would pay the principal and interest of the bonds in case of the failure of the railroad company to do

so. Proof was administered that the railroad company was insolvent. It was further set up that by the tenth section of the act, the guarantee of the Government made full proof that all the conditions of the act of the Legislature, (act No. 26, of 1869) had been fully complied with.

The defense set up by the Attorney General was, that these bonds were not the bonds of the State, and therefore not fundable under act No. 3 of 1874; that the conditions of the act No. 26 of 1869, to be peformed on the part of the company, in order to obligate the State to guarantee the payment of the bonds, had not been complied with; and that therefore the obligation of the State to give this guarantee had, in the words of the act, ceased and determined, and this before the guarantee had or could have been given; that among the conditions were that a section of forty miles should be completed within a specified time, and the whole road within a certain other specified time, and that the bonds were to be guaranteed, only as each section of forty miles was completed; that the first section of forty miles was to have been completed on or before January 18, 1871; the whole road to the Sabine by January 18, 1873, and to Houston, Texas, by July 18, 1873; that the first section was not completed until May (April), 1871, and that no second section of forty miles was yet completed; that the obligation of the State to guarantee the payment of the bonds had ceased and determined on January 18, 1871, and the amendment to the constitution limiting the State debt to $25,000,000, adopted by vote of the people, November 7, 1870,

had supervened, and the further increase of the debt or obligation of the State was prohibited, the constitutional limit of the State debt having already been exceeded; that the guarantee of the payment of these bonds, after the obligation to do so had ceased and determined, was the creation of a new debt, and being in violation of the constitution, the act of the Governor was null and was beyond his power.

On these pleadings, in substance, the case went to trial. The plaintiff, by a production of the bonds, the testimony of Mr. Gaines, president of the bank, and the admissions in the record, proved the allegations of fact in the petition. The defendant offered the certificate of G. W. R. Baily, assistant engineer, which, if admissible at all, was taken as full proof of what it contained. This certificate was fully corroborated by the witness Dodge, who was a contractor on the road. The certificate of the engineer is as follows:

"The following are the dates of the completion of the New Orleans, Mobile and Texas Railroad Company west from Westwego, opposite Greenville, taken from my letter press copies of my estimates in favor of the tracklaying contractors.

"January 1, 1871—4$\frac{2}{5}$ miles track laid west from Westwego.

"February 1, 1871—14$\frac{3}{4}$ miles track laid west from Westwego.

"March 1, 1871—26 $\frac{44}{100}$ miles track laid west from Westwego.

"April 1, 1871—39 $\frac{15}{100}$ miles track laid west from Westwego.

"April 5, 1871—certificate given to Governor H. C. Warmoth, that forty continuous miles of track of the main line of the New Orleans, Mobile and Texas Railroad, commencing on the right bank of the Mississippi river, opposite New Orleans, and thence extending westward, are completed and trains are now running thereon.'

(Signed) HENRY VAN VLECK,
Chief Engineer.

"May 1, 1871—49$\frac{2}{3}$ miles track laid from Westwego.

May 31, 1871—56 $\frac{97}{100}$ miles track laid from Westwego.

"The 56 $\frac{97}{100}$ miles of main line, to the Bayou Lafourche, at Donaldsonville, were completed on or about the seventeenth of May, 1871, but the estimate, as usual, was given at the end of the month.

"In the spring of 1873, after I left the road, the track was extended ten miles west of the Bayou Lafourche, to a point on a plantation east of Bayou Goula, on or about the tenth of March, 1873, making a total distance of about 67 miles of track.

Respectfully yours,

(Signed) G. W. R. BAYLEY."

Dodge testified that the statement of the certificate was correct, that he was at the end of the track on the first of April, 1871, and the first section of forty miles was not then completed; that on the fifth of April he was there again and forty miles was then completed, and he also corroborates the other statements of the certificate; that he had seen the certificate of the chief engineer, Van Vleck, copied into

the certificate of Assistant Engineer Bayley, that the date was correct, and the substance substantially as he recollected it.

There is no dispute about the facts. The first section of forty miles was not completed on January 18, 1871, as required by act No. 26 of 1869; less than fifteen miles was completed on first of February, 1871, and the forty miles not until the fifth of April, 1871, nor was the certificate of the engineer furnished the Governor until that date.

By act No. 26, approved February 17, 1869, those representing that railroad company procured the engagement of the State of Louisiana to guarantee the payment of its second mortgage bonds to the extent of $12,500 per mile of its entire main line, from the west bank of the Mississippi river, opposite New Orleans, to Houston, Texas. This guarantee was to be given under certain conditions, among them were—

First—That the company was to accept the conditions of the grant within ninety days, or before May 18, 1869.

Second—That it was to survey and locate the railroad to Houston, Texas, within eight months of acceptance of the conditions, or before January 18, 1870.

Third—That it was to construct a section of forty miles within one year from the date of the survey and location of the entire line, or before January 18, 1871.

Fourth—To construct and lay the rails thereon to the Sabine river within three years from the date of the location, or before January 18, 1873. And

Fifth—To Houston, Texas, within six months thereafter, or before July 18, 1873.

On November 7, 1870, the amendment to the constitution limiting the State debt was voted on by the people and adopted; and the limit having been already reached, the State could create no new debt after November 7, 1870.

The obligations of the State, under act 26, of 1869, having been incurred prior to the constitutional amendment, were not affected by it, *per se*, nor unless the conditions of the act should not be complied with. But by the failure of any one of the conditions precedent, the State would be released from its obligation.

On the eighteenth of January, 1871, the first section of forty miles required by act 26 of 1869, to be completed and the rails laid thereon had not been completed nor the rails laid, nor was it till some two months later. See testimony of Bayley, engineer, and Dodge. The condition precedent, the third condition named, had not been complied with, and therefore, the obligation of the State to guarantee the bonds had ceased, the grant had lapsed.

There being then, after January, 18, 1871, no subsisting obligation on the part of the State to guarantee the second mortgage bonds of the Railroad Company, their guarantee by the State after that date, would be the creation of a new debt, and such guarantee would be null, by reason of the constitutional amendment.

The proof is (see testimony of Bayley) that the Road has not yet been completed to the Sabine, nor to Houston; in fact only for about sixty-seven miles in

all; although the time has elapsed for each and every section (to the Sabine, January, 18, 1873, and to Houston, Texas, July, 18, 1873), to have been completed.

One of the conditions of the grant in act No. 26, of 1869, that of building a section of forty miles before January, 18, 1871, had not been complied with. There was then no subsisting obligation on the part of the State to guarantee the second mortgage bonds of the road after January, 18, 1871, and the constitutional amendment limiting the State debt having in the meantime intervened, the Legislature could not create a new debt.

Being void *ab initio*, the Legislature being without power to authorize their issue, or to add to the State debt, the bonds are worthless in the hands of third holders, however innocent they may have been in their purchase. The bonds never having had any legal validity, are worthless in whose hands soever they may be found.

But a reference to the act is on the back of the bonds, and forms, therefore, a part of the conditions of the bonds, and must give full notice to the holder.

The terms of the act referred to in the bond as a part thereof was a full notice to all holders. The company was

First—To complete a section of forty miles, west from New Orleans, as per act No. 26 of 1869, before January 18, 1871.

Second—To complete the entire main road from New Orleans to the Sabine river, before January 18, 1873.

Third—To complete the railroad to Houston, Texas, as per the same act, before July 18, 1873.

Innocent third holders can not claim want of notice. They saw on their bonds that they were issued by virtue of an act approved February 17, 1869, with all the foregoing conditions necessary to their validity attached.

They then did have notice that the bonds had been illegally issued. They were not and can not be innocent third holders. The very bonds themselves put the purchasers on their guard. The authorities therefore as to innocent third holders, before maturity, do not apply. The bonds are issued by the railroad company.

This case is stated to be similar to that of the North Louisiana and Texas Railroad Company case. This is not so.

In that case the State was under obligations to issue its own bonds on the completion of every five miles of road, to the extent of $6000 per mile. In this case it was to guarantee the payment of the second mortgage bonds of the company issued by itself.

In that case there was, after the completion of the first section of six miles, no limit as to the time for the completion of the road, or any section of six miles of the road.

In this case there were several limitations as to time, the failure to comply with any one of which was fatal to the entire grant, and released the State from any obligation to the company—not as to one, but as to every condition of limitation as to time, was there a failure to comply with the conditions.

In that case there was a subsisting obligation on the part of the State, not subject to the constitutional amendment limiting the State debt.

In this case, by failure of the conditions precedent, the constitutional amendment intervened, and the obligations of the State to the company having ceased, the constitutional amendment prohibited the revival of the previous subsisting obligation of the State.

There is no such similarity in the case of the North Louisiana and Texas Railroad Company as to warrant its citation as a precedent or authority in this case.

It may be said that joint resolution No. 94, approved April 18, 1871, changed the size of the sections to be completed as to the condition precedent for the guarantee of the second mortgage bonds of the railroad company, from forty miles to ten miles, and that therefore the condition for the completion of the first forty miles was changed.

This is not good, for

First—There is nothing in the object of act 94 of 1871, as expressed in its title, to authorize such a change, and

Second—If there were, the condition of the completion of the first forty miles not having been complied with in time, there was a lapse on January 18, 1871, just three months before the passage of joint resolution No. 94 of 1871.

There was then no subsisting obligation of the State to be changed on the eighteenth of April, 1871, and the obligation of the State could not be revived by reason of the limitation of the State debt by the constitutional amendment.

That act, or joint resolution, (No. 94), of 1871, can not therefore be made available in this case.

In regard to innocent third holders: they took the bonds, with the act authorizing their issue, named on the face of the bonds, and this act gave all the information as to the conditions necessary for their issue which have heretofore been given. They were not therefore such innocent third holders as will be relieved from such equities and nullities as exist against the railroad company.

In Diamond vs. Lawrence county, 37 Pa. State 353, the court held that "all purchasers of such bonds (bonds issued by counties under authority of an act of the State Legislature) are bound to take notice of the law under which they are issued. Even in the hands of innocent and remote purchasers, they are subject to the equities existing against them when in the hands of the first purchasers from the company."

In Aspinwall et als. vs. The Commissioners of the county of Daviess, 22 How. U. S. Reports, p. 365, in a case where a constitutional amendment had intervened between a vote of the taxpayers of a county under authority of an act of the Legislature, authorizing a subscription to the stock of a railroad company passing through the county, and the issue of the bonds, by which amendments the counties were prohibited from subscribing for such stock or issuing bonds therefor, it was held that "the bonds were issued in violation of the constitutional amendment (of Indiana) and are therefore void."

In the case of the State vs. the town of Genoa, 23 N. Y. p. 440, it was held that "one who purchased the bonds from the railroad company at a discount, with the knowledge that the corporation had received

them in direct exchange for stock, though he be a *bona fide* holder, takes the bonds subject to any defense existing against them. The plaintiff is bound to prove affirmatively that the written assent of the requisite number of resident taxpayers was in point of fact obtained and filed in the county clerk's office, as required by the statute. The town is not bound by the representation of its officers, upon the face of the bond, that such assent had been obtained and filed; such a representation is of a fact which goes to the constitution of the agency, and which is of no effect as against the alleged principal."

In the Floyd Acceptances, 7 Wall. 666, (675–681), the above doctrine was applied in a case of the government of the United States, and the doctrine as quoted in the above cases as applied to municipal corporations, was enunciated to its fullest extent. The syllabus in the foregoing decisions is quoted from and the text is referred to, especially of the latter case.

A third holder must look to the facts which were conditions precedent to the issue of the bonds and see that they had transpired, because the very right of of the Governor (or Treasurer) to issue the bonds depended upon the happening, the fulfilling of the conditions, and these formed or entered into the power of agency of the Governor to issue the bonds, or as said in 23 N. Y., "goes to the constitution of the agency," and must be noticed by the third holder.

It is contended that under the tenth section of act 26 of 1869, the certificate of the Governor guaranteeing the payment of the bonds is full proof that all

the conditions of the act have been complied with. However correct this might be, prior to the lapsing of the right of the company to enforce the guarantee, and this is by no means admitted, but denied to be good law, yet after the obligation of the State had ceased and determined by failure to complete the first section of forty miles before the eighteenth of January, 1871, the Governor of the State was without authority to give any guarantee whatever. His power had ceased and determined. What before might have been the act of the State, through its mandatary, the Governor, became the act of the person occupying the gubernatorial chair, without any power to bind the State in the premises. But no Legislature can give such power to any officer as will enable him to bind the State in absolute wrong, and with no benefit to the State whatever. The doctrine contended for would make the act of the Governor binding beyond the power of rebuttal by proof, had he guaranteed these bonds without a certificate of *completion*, without a commencement of work, without a survey or location of the route, without even the acceptance of the terms of the act by the corporation. The certificate of the Governor, guaranteeing the bonds, is only as to the completeness of the work, not that work is completed which has never been done; goes to the satisfactoriness of the certificate furnished, and does not apply where no certificate at all has been furnished.

But there seems to be a further popular mistake attending these second mortgage bonds. It is supposed that the railroad company could under act No. 26 of 1869, issue its second mortgage bonds to the ex-

tent of $12,500 per mile, for its whole contemplated distance, and have them guaranteed as to their payment by the State, as sections of forty miles were completed, even a cursory reading of the statute conclusively negatives this idea. The railroad company was authorized to create a second mortgage on its road for the entire length. When the act of mortgage (the notarial act) was completed, it was to be recorded after approval by the Governor. When forty miles were completed it could prepare bonds, such as described in act 26, of 1869, to the extent of $12,500 per mile, or $500,000 for sections of forty miles, present them to the Governor, with the Engineers certificate of completion, secure the guarantee of the Governor for their payment, by the State *and it could then issue the bonds and then only*; and so on as each and every section of the forty miles should be completed. This was subject to the condition of the construction of the first section before January 18, 1871, and in order, as the title of the act sets forth, "to expedite the construction of the railroad etc."

A perusal of the act will show this. The result is that on failure to complete the first section of forty miles in time, the right was lost even to the company to issue any second mortgage bonds. The object of act No. 26 of 1869, had failed. If the right to issue had lapsed. the obligation of the State to guarantee had certainly ceased and determined.

It is respectfully submitted that there should be judgment for defendant as prayed for.

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Supreme Court of Louisiana.

No. 5768.

STATE OF LOUISIANA,

vs.

CHARLES CLINTON, ET AL.

The New Orleans Mobile and Texas Railroad Compang and Williams & Guion, Intervenors.

Appeal from the Superior District Court, parish of Orleans.

The State, through the Attorney General, enjoined the Auditor and Treasurer from warranting for or paying a large amount of bonds, coupons and other outstanding claims against the State, upon various grounds of nullity. Among other issues of State bonds, were $2,500,000 eight per cent. bonds issued to the New Orleans, Mobile and Texas Railroad Company under the provisions of act No. 95, approved April 20, 1871.

The grounds set up in the pleadings for injoining the payment of these bonds, and the coupons attached, $8,000,000 more, may be briefly stated under three heads:

***First*—That the conditions of the act upon which they were to be issued had not been complied with.**

***Second*—That they were obtained by fraud, and**

were a disguised donation, and were without any consideration whatever.

Third—That their issue was in violation of the State constitutional limitation to the State debt.

By the terms of the act the construction of the railroad from Vermilionville to Shreveport, and for the building of which road the bonds purport to have been issued, was to have been commenced within six months from the passage of the act, or before the twentieth of October, 1871. The proof is that no *bona fide* commencement was ever made. No survey or location of the route was ever made, or any part thereof. Bailey, the engineer, says there were no field notes of even the three hundred feet pretended to have been worked on. The letter of Raynor, the president, shows it was intended only as a sham, a feint, and the testimony of the witnesses clearly proves such to have been the case. A case of non-compliance with the conditions of the act is fully made out, and a clear case of fraud and want of consideration proven. The want of consideration is doubly manifest from the fact that by act 31 of 1870, the entire road to Shreveport, some 200 miles, was to have been completed in five years, or by May 22, 1875, while not one rod is as yet located.

By act No. 28, approved August 19, 1868, the New Orleans, Mobile and Chattanooga Railroad Company was recognized as a corporation, with its domicile in New Orleans, and for the avowed purpose of building a railroad from Chattanooga, Georgia, via Mobile, Alabama to New Orleans.

By act No. 26, approved February 17, 1869, the

representing that railroad company procured the indorsement of the State of Louisiana guaranteeing the payment of its second mortgage bonds to the extent of $12,500 per mile of its entire main line, from the west bank of the Mississippi river, opposite New Orleans, to Houston, Texas. This guarantee was to be given under certain conditions, among them were—

First—That the company was to accept the conditions of the grant within ninety days, or before May 18, 1869.

Second—That it was to survey and locate the railroad to Houston, Texas, within eight months of acceptance of the conditions, or before January 18, 1870.

Third—That it was to construct a section of forty miles within one year from the date of the survey and location of the entire line, or before January 18, 1871.

Fourth—To construct and lay the rails thereon to the Sabine river within three years from the date of the location, or before January 18, 1873. And

Fifth—To Houston, Texas, within six months thereafter, or before July 18, 1873.

On November 7, 1870, the amendment to the constitution limiting the State debt was voted on by the people and adopted; and the limit having been already reached, the State could create no new debt after November 7, 1870.

The obligations of the State, under act 26, of 1869, having been incurred prior to the constitutional amendment, were not affected by it, *per se*, nor unless

the conditions of the act should not be complied with. Then by the failure of any one of the conditions precedent, the State would be released from its obligation.

By act No. 30, of February 21, 1870, the guarantee of the State of the payment of the second mortgage bonds of the company was extended to a branch road it was authorized to build from Vermilionville to Shreveport, subject to all the conditions of act 26 of 1869, except that it was required to finish that branch road within five years from the date of act 31, or before May, 1875.

On the eighteenth of January, 1871, the first section of forty miles required by act 26 of 1869, to be completed and the rails laid thereon had not been completed nor the rails laid, nor was it till some two months later. See testimony of Bailey, engineer, and Dodge. The condition precedent, the third condition named, had not been complied with, and therefore, the obligation of the State to guarantee the bonds had ceased, the grant had lapsed.

There being then, after January, 18, 1871, no subsisting obligation on the part of the State to guarantee the second mortgage bonds of the Railroad Company, their guarantee by the State after that date, would be the creation of a new debt, and such guarantee would be null, by reason of the constitutional amendment.

The proof is (see testimony of Bailey) that the Road has not yet been completed to the Sabine, nor to Houston; in fact only for about sixty-seven miles in all; although the time has elapsed for each and every section (to the Sabine, January, 18, 1873, and to Hous-

ton, Texas, July, 18, 1873), to have been completed. See also testimony of Rogers and see the acts of legislature.

Now, after the lapsing of the entire grant by the failure to complete the first forty miles, say, on January, 18, 1871, and not until three months and two days afterwards was act 95 of 1871 approved, that is, April, 20, 1871, under which the bonds here in controversy pretend to have been issued, the constitutional amendment must intervene to prevent a legal issue. The scheme of the act (95) is that by the issue of these bonds for stock, the State would be relieved from its obligation to guarantee the second mortgage bonds, for the branch from Vermilionville to Shreveport, which the State had obligated itself to do under act 31 of 1870. This was on the twentieth April 1871.

Referring to act 31 of 1870, we find that it simply extends the obligation of the State to guarantee the second mortgage bonds of the Company on the Vermilionville and Shreveport branch, and according to the terms found in act 26 of 1869; but this only by reference to and without re-enacting the provisions of the act of 1870, except in adding that the Road to Shreveport must be completed within five years from the date of the act, or before May 22, 1875.

But one of the conditions of the grant in act No. 26, of 1869, that of building a section of forty miles before January, 18, 1871, had not been complied with. There was then no subsisting obligation on the part of the State to guarantee the second mortgage bonds of the road after January, 18, 1871, and the constitu-

tional amendment limiting the State debt having in the meantime intervened, the legislature could not create a new debt.

The issue of the bonds, therefore, under act 95, being to relieve the State from no subsisting obligation, was the creation of a new debt, was therefore in violation of the constitution, and the bonds are therefore null and void.

Being void *ab initio*, the Legislature being without power to authorize their issue, or to add to the State debt, the bonds are worthless in the hands of third holders, however innocent they may have been in their purchase. The bonds never having had any legal validity, are worthless in whose hands soever they may be found.

But the text of the act is on the back of the bonds. This forms, then, a part of the conditions of the bonds, and must give full notice to the holder.

But the act in its very terms does not contemplate an immediate issue of the entire bonds. They were evidently to have been issued in lots of say $500,000 each, on the completion of forty mile sections of the branch road—(five sections, 200 miles, $2,500,000 bonds). The act of 1871 refers to act 31 of 1870 to fix the liability of the State sought to be released, which latter act re-enacts, by simple reference only, the provisions of act No. 26 of 1869, and this act requires the bonds to be guaranteed in lots of $500,000 on the completion of forty mile sections of the road. This rule was extended to act 31 of 1870, while act 95 of 1871, simply authorized the issue of State bonds for stock at par in lieu of the second mortgage bonds

of the company, to be guaranteed by the State under the acts of 1870 and 1869.

The use of the word "complete," in the second clause of the first section of act 95, and of the phrase "or such part thereof," in the second section of the act as connected with the issue of the bonds and their payment is without meaning, unless the above interpretation be given the act. A complete issue presupposes a partial issue. Another of the conditions of the act has not therefore been complied with. It is not pretended that a section of forty miles of this branch road has been completed, or even begun.

Under act 95, printed on the back of each bond as a full notice to all holders, the company was

First—To complete a section of forty miles, west from New Orleans, as per act No. 26 of 1869, before January 18, 1871.

Second—To complete the entire main road from New Orleans to the Sabine river, before January 18, 1873.

Third—To complete the railroad to Houston, Texas, as per the same act, before July 18, 1873.

Fourth—To complete the branch road to Shreveport before May 22, 1875, now an utter impossibility, with only four months remaining at the time of the judgment in this case, and nothing done, not even a preliminary survey made—none of the conditions have been complied with, or can be.

Fifth—And expressly, under act 95, to commence the work before the twentieth October, 1871. The testimony of Bailey, the Boudreauxs' and others, and the letter of Raynor, the president, shows how this

was done. A mere feint was made, with no intent of making a beginning, or even the possibity of it until the road should reach Vermilionville, on the main line. See Raynor's letter to Bailey.

Sixth—To complete sections of forty miles each of this Shreveport branch, as a condition precedent to the issue of $500,000 of these bonds for stock, in lieu of the guarantee of the second mortgage bonds of the company.

Innocent third holders can not claim want of notice. They saw on their bonds that they were issued by virtue of an act approved April 20, 1871, with all the foregoing conditions necessary to their validity attached; that their bonds were executed only two days after the passage of this act, May 22, 1871. They needed no further notice of fraud, because they knew that no portion of the road could have been built in two days, much less could the first forty miles, to say nothing of the whole road, or two hundred miles.

They then did have notice by the dates of their bonds, and of the act printed upon it, that they (the bonds) had been fraudulently issued. They were not and can not be innocent third holders. The very bonds themselves proclaimed a fraud. The authorities therefore as to innocent third holders, before maturity, do not apply.

The bonds are made payable to the railroad company. There is really nothing to show they are not still the assets of the railroad company, although made payable alternately to the bearer, yet as the railroad company, in its intervention, substantially

alleged ownership, and as the same attorney who filed the intervention for the railroad company produced the bonds, there is a strong presumption that the bonds are still the assets of such a corporation as existed.

But the railroad company never accepted the conditions of the law.

There was no law, such as act No. 95 of 1871 purports to be, prior to April 20, 1871. The passage of resolutions by the railroad company, on the eighth of April, 1871, in New York, could not have been the acceptance of the terms and conditions of an act not in existence in Louisiana until twelve days after. The whole thing shows fraud, an attempted robbery of the State of $2,500,000 in bonds, with $8,000,000 in interest coupons attached.

But under sections 740 and 741 of Revised Statutes, the resolution of the company was unlawful and of no effect, not having been passed in Louisiana.

This case is stated to be similar to that of the North Louisiana and Texas Railroad Company case. This is not so.

In that case the State was under obligations to issue its own bonds on the completion of every five miles of road, to the extent of $6000 per mile. In this case it was to guarantee the payment of the second mortgage bonds of the company issued by itself.

In that case there was, after the completion of the first section of six miles, no limit as to the time for the completion of the road, or any section of six miles of the road.

In this case there were several limitations as to time,

the failure to comply with any one of which was fatal to the entire grant, and released the State from any obligation to the company—not as to one, but as to every condition of limitation as to time, was there a failure to comply with the conditions.

In that case there was a subsisting obligation on the part of the State, not subject to the constitutional amendment limiting the State debt.

In this case, by failure of the conditions precedent, the constitutional amendment intervened, and the obligations of the State to the company having ceased, the constitutional amendment prohibited the revival of the previous subsisting obligation of the State.

In that case (that of the North Louisiana and Texas Railroad Company), that act imposed no condition for the issue of bonds by installments. They were to be issued at once for the stock of the company, and to the whole amount of the existing obligation of the State.

In this they were to be by installments, as evidenced by the word "complete" in the first section of act No. 95, and of "or for any part thereof," in the second section.

The authors of the act 108 of 1872, authorizing the issue of the bonds of the State for stock to the North Louisiana and Texas Railroad Company, *improved* on the terms of the act No. 95 of 1871, in favor of the New Orleans, Mobile and Texas Railroad Company, by which the bonds in controversy were issued, by omitting the words "complete," and "or for any part thereof," quoted above. The State was not to issue the bonds in that case by installments of $30,000—but all, at once.

In this case the bonds were to be issued by installments, if demanded, of $500,000.

There is, then, no such similarity in the case of the North Louisiana and Texas Railroad Company as to warrant its citation as a precedent or authority in this case.

The original cost of the road can not avail in this case. The testimony shows it could not have cost over $2,000,000, for that part west of the Mississippi river. The company procured from the State $750,000 subsidy bonds, for which the State has judgment. The company also had and used $875,000 second mortgage State guarantee bonds, and was entitled by the act authorizing the guarantee to issue first mortgage bonds to a like amount. $2,500,000 bonds used by the company for doing what it did west of the river, worth at 80 per cent. $2,000,000; enough to pay for all the company had done.

But when the contractors quit work about April 1, 1873, the company was in debt to them over $600,000, and yet the proof is the stock was worth nothing.

There can be no escape from the failure to commence the work in time, by reason of the purchase of the Opelousas road from Charles Morgan. It did not go to Shreveport; was not purchased with any such intention, but taken as a burden from Charles Morgan, that he might be relieved from worthless property, and add to the value of his road to Brashear by the completion of the road purchased, from Brashear to Vermilion.

But it may be said that joint resolution No. 94, approved April 18, 1871, changed the size of the sec-

tions to be completed as to the condition precedent for the guarantee of the second mortgage bonds of the railroad company, from forty miles to ten miles, and that therefore the condition for the completion of the first forty miles was changed.

This is not good, for

First—There is nothing in the object of act 94 of 1871, as expressed in its title, to authorize such a change, and

Second—If there were, the condition of the completion of the first forty miles was not complied with in time, and there was a lapse on January 18, 1871, just three months before the passage of joint resolution No. 94 of 1871.

There was then no subsisting obligation of the State to be changed on the eighteenth of April, 1871, and the obligation of the State could not be revived by reason of the limitation of the State debt by the constitutional amendment.

That act, or joint resolution, (No. 94), of 1871, can not therefore be made available in this case.

In regard to innocent third holders: they took the bonds, dated the fourth day after the approval of act 95, authorizing their issue, with the act named in the face of the bonds, and printed in full on the back, and this act contained a reference to the preceding acts, and gave all the information as to the conditions necessary for their issue which have heretofore been given. They were not therefore such innocent third holders as will be relieved from such equities and nullities as exist against the railroad company.

In Diamond vs. Lawrence county, 37 Pa. State 353,

the court held that "all purchasers of such bonds (bonds issued by counties under authority of an act of the State Legislature) are bound to take notice of the law under which they are issued. Even in the hands of innocent and remote purchasers, they are subject to the equities existing against them, when in the hands of the first purchasers from the company."

In Aspinwall et als. vs. The Commissioners of the county of Daviess, 22 How. U. S. Reports, p. 365, in a case where a constitutional amendment had intervened between a vote of the taxpayers of a county under authority of an act of the Legislature, authorizing a subscription to the stock of a railroad company passing through the county, and the issue of the bonds by which amendments the counties were prohibited from subscribing for such stock or issuing bonds therefor, it was held that "the bonds were issued in violation of the constitutional amendment (of Indiana) and are therefore void."

In the case of the State vs. the town of Genoa, 23 N. Y. p. 440, it was held that "one who purchased the bonds from the railroad company at a discount, with the knowledge that the corporation had received them in direct exchange for stock, though he be a *bona fide* holder, takes the bonds subject to any defense existing against them. The plaintiff is bound to prove affirmatively that the written assent of the requisite number of resident taxpayers was in point of fact ob tained and filed in the county clerk's office, as required by the statute. The town is not bound by the representation of its officers, upon the face of the bond, that such assent had been obtained and filed; such a rep-

resentation is of a fact which goes to the constitution of the agency, and which is of no effect as against the alleged principal."

In the Floyd Acceptances, 7 Wall. 666, (675, 681), the above doctrine was applied in a case of the government of the United States, and the doctrine as quoted in the above cases as applied to municipal corporations, was enunciated to its fullest extent. The syllabus in the foregoing decisions is quoted from and the text is referred to, especially in this latter case.

A third holder must look to the facts which were conditions precedent to the issue of the bonds and see that they had transpired, because the very right of of the Governor (or Treasurer) to issue the bonds depended upon the happening, the fulfilling of the conditions, and these formed or entered into the power of agency of the Governor to issue the bonds, or as said in 23 N. Y., "goes to the constitution of the agency," and must be noticed by the third holder.

It is therefore submitted that the interventions should be dismissed; that act No. 95, approved April 20, 1871, be declared unconstitutional, and the issue of $2,500,000 of bonds under the provisions of said act have been issued in fraud and in violation of the constitution of the State, without any consideration, and *ab initio* null and void.

A. P. FIELD,
Attorney General.
J. Q. A. FELLOWS,
J. B. COTTON,
Of Counsel.

UNITED STATES SUPREME COURT.

No. 757.

WILLIAMS & GUION, PLAINTIFFS IN ERROR,

versus

THE STATE OF LOUISIANA ET AL., DEFENDANTS IN ERROR.

October Term of 1876.

BRIEF OF DEFENDANT IN ERROR.

I.

The State of Louisiana, by the Attorney General, on December 30th, 1872, enjoined, in the Superior District Court of New Orleans, Charles Clinton, the Auditor of Public Accounts, from warranting for, and Antoine Dubuclet, the State Treasurer, from paying certain claims against the State, in the form of bonds, coupons, warrants already drawn and appropriations by the Legislature, on various grounds of nullity and fraud.

Among these, in all some $44,000,000, were certain bonds of $1000 each, purporting to have been issued to the New Orleans, Mobile and Texas Railroad Company, to the extent *of* $2,500,000, with coupons attached, under the provisions of Act No. 95 of 1871 of Louisiana.

Record, pages 1 to 8 and 23, 24.

II.

In this suit, the plaintiffs in error intervened, claiming to be "the lawful owners and holders, for value and before maturity, of three bonds" of the above issue, dated April 24, 1871, purchased in open market, relying "on the contract or promises contained in and evidenced by said bonds, and without any notice of any fact going to affect their validity."

"That said bonds, from the time they were purchased by your petitioners, (plaintiffs in error,) have constituted valid contracts between your petitioners and the State of Louisiana, which the said State has no right in any wise to impair; and your petitioners assert and claim herein the rights guaranteed to them by the 10th section of the 1st article of the Constitution of the United States, forbidding the impairing by the said State of the said contracts."

Record, page 30.

III.

The State, to this claim of Williams & Guion, put specially at issue the allegations of fact.

Record, page 33.

Also, set up various grounds of fraud and nullity: for which, see

Record, pages 11 and 27.

Questions of fact were gone extensively into.

Record, pages 43 to 48, 51. 54 to 77.

The case is fully stated by the Court of the first instance in his reasons for judgment.

Record, pages 78 to 81.

The Court found that the Railroad Company, having acquired, by Act No. 28 of 1868, the franchise to construct and run a railroad, etc., through Louisiana to the State of Texas, obtained, under act 26 of 1869, the obligation of the State, under certain conditions precedent, to guarantee its second mortgage bonds to the extent of $12,500 per mile from New Orleans to Texas, which was extended by Act 31 of 1870 to a branch road from Vermilionville to Shreveport, a distance of about 200 miles, under the conditions of Act 26 of 1869.

One of the conditions was, that the Railroad Company was to complete a continuous section of its road westward from New Orleans, of forty miles, on or before a certain time, to wit: the 17th January, 1871; and in case of failure, that the State is discharged from her obligation to guarantee the second mortgage bonds.

This the Court deduced from the statutes themselves, above named, and found from the testimony in the Record, that the proof of failure was conclusive.

From this he concluded that there was therefore, on the 18th January, 1871, "no longer any obligation resting upon the State of Louisiana to guarantee the second mortgage bonds of the Company."

He had found that, in the meantime, the constitutional amendment limiting the State debt to $25,000,000 had been adopted by the people—November 6th, 1870, and that the limit had already been reached at the time of its adoption; and therefore, that this amendment, though it could not impair the obligations of the acts 26 of 1869 and 31 of 1870, did prohibit the creation of any debt, either by the revival of an obligation which has ceased and determined, or otherwise.

He therefore held, that the Act 95, approved April 8, 1871, was, in effect, the creation of a new debt, in violation of the Constitution of Louisiana.

He found that Act 95 of 1871, under which these bonds were issued, attempted to create a debt of $2,500,000, where there was no subsisting obligation.

The Act 95 of 1871 authorized the State to issue to the Railroad Company $2,500,000 of bonds, for a like amount of stock, on condition that the Company would discharge the State from its obligation to guarantee its second mortgage bonds on the branch road from Vermilionville to Shreveport, and on the further condition that the Railroad Company should commence work on that branch within six months.

The Court found, as before stated, that there was no subsisting obligation on April 8th, 1871, the date of the passage of the act, and therefore, that there was no substitution of one obligation for another, but the creation of a new debt, in violation of the Constitution of Louisiana.

He also found that the Railroad Company had never made, either before or after the expiration of the six months, a commencement of the construction of this branch road; and that therefore, there was no authority for the issuance of these bonds.

IV.

The plaintiffs in error, in their application for a new trial in the Court of the first instance, controvert the opinion of the Court on the foregoing and other essential questions of fact and interpretations of the statute, and say:

Ninthly, that they "are protected by the provision of the Constitution of the United States forbidding a State to impair the obligation of its own contract."

Record, page 83.

No State enactment here, any more than in their answer, is designated as coming within the constitutional prohibition.

If the question can be considered as raised, it is nowhere decided, nor does it appear that the decision of

the Federal question is in any sense necessary to the decision of the case, as it was presented to the Court of the first instance.

V.

The same line of argument, upon necessarily the same issues, was pursued in the Supreme Court of Louisiana, and the findings were the same.

Record, pages 122 to 126.

There were certain conditions precedent, attached to the grant of State aid by acts 31 of 1870; and 26 of 1869, a failure on the part of the Railroad Company in any one of which would cause a forfeiture of the grant. The completion of a section of forty miles, within a certain time, was one of these conditions; the company failed; the obligation of the State ceased and determined. There was on January 18th, 1871, no subsisting obligation: the constitutional amendment supervened. The Legislature could not, therefore, create a new debt; the revival of a lapsed obligation was the creation of a new one; therefore act 95 of 1871 was in violation of the State Constitution, and the bonds under it null and void.

The Court did not hold that the constitutional amendment in any way impaired the obligations of the acts 26 of 1869 and 31 of 1870, but that the obligations of the State, under these acts, remained in full force and effect, until the same lapsed; then, there being no subsisting obligation, the constitutional amendment prevented the legal

passage of act 95 of 1871, creating a new debt of $2,500,000.

The Supreme Court go further, and find that if there was a subsisting obligation, and therefore one which the constitutional amendment could not impair, and sufficient to form the basis of act 95 of 1871, yet that the condition precedent, to commence the work within six months, was not performed, and there was no authority in the Governor, under their interpretation of the statute, to issue the bonds; and yet they were issued within two weeks after the passage of the act.

They found that the plaintiffs in error could not be held ignorant and therefore innocent, when the statute itself was printed on their bonds, with the date of its approval, and reference to the previous acts of the Legislature upon which it was based.

"When the constitutional limitation went into force, in November, 1870," says Judge Wyly, the organ of the Court, "the State was under an obligation to guarantee second mortgage bonds on sections of forty miles, if properly completed, on the main line and on the branch line to Shreveport. If the sections should be completed and the rails laid within the time and manner specified in said acts of 1869 and 1870, and the mortgage to the State be approved, etc., then the State would be under obligation to guarantee said second mortgage bonds."

"The conditions precedent have not happened * * *

and the conditional obligation of the State to said company has lapsed. The obligation of the State * * * has lapsed because the said company failed to complete the first section of forty miles of the main line by the 18th January, 1871; they failed to complete any of the other sections of the said main line within three years after the survey and location; and they failed to survey, locate, construct and put in running order any part of the branch road within five years."

Record, pages 124, 125.

The Supreme Court of Louisiana passed upon the lapse of the grants under acts 26 of 1869 and 31 of 1870, found the obligations had "ceased and determined" *prior* to the passage of act 95 of 1871, and that therefore the issue of bonds under this latter act "do not represent a debt incurred prior to the constitutional amendment, for there was none; they merely evidence a debt contracted since then, and in violation of said amendment."

VI

A rehearing was applied for and refused.

Record, pages 127 to 129.

In this application, various grounds are set up.

Notwithstanding the foregoing, in the second of the grounds for rehearing, it is contended that "by your Honors' decision, the constitutional amendment of November, 1870, limiting the State debt, is made to impair and de-

stroy the obligation of a contract of the State, whose historical foundation and origin existed prior to that amendment." (Record, page 128.)

This is the first designation, in the record, of the Federal question, and is in the motion, or argument, for a rehearing.

The Court had held that the antecedent "historical foundation" had lapsed, and that the constitutional amendment simply prevented the building up of a new debt, where the lapsed obligation had previously existed. Did this in any form impair the obligation of a contract?

And lest it possibly might, they say that the conditions precedent, of act 95 of 1871, were not complied with, and therefore the issue of the bonds in question were without authority and void *ab initio*. Had the State Supreme Court rested its decision upon this last question, where could be found the Federal question in the case? Is there any necessary Federal question passed upon?

Such are the pleadings found in the record, in any way intimating that the Federal question exists in the case.

If none can be found to have been raised and necessarily decided, the case on the merits cannot be inquired into further by this Court, and the writ of error should be dismissed.

VII.

The briefs in this case in the State Supreme Court, and

those in the cognate case of the State ex. rel. Citizens' Bank vs. the Board of Liquidation (No. 782 of this term) are annexed, as exhibiting, in connection with the opinions of the Judges of the State Courts, as found in the record, a full argument on the merits.

VIII.

1st. There is no Federal question raised or decided in this case by the State Court; and,

2d. If there is, the case on the merits is with the defendants.

Respectfully submitted.

J. Q. A. FELLOWS,
Attorney for Defendants in Error.